DEPARTMENT OF HEALTH & HUMAN SERVICES

Health Care Financing Administration

Washington, D.C. 20201

MAR 5 1999

The Honorable Tom Bliley
Chairman, Committee on Commerce
Room 2125, Rayburn House Office Building
House of Representatives
Washington, D.C. 205 15-6 115

Dear Chairman Bliley,

Thank you for your letter to Secretary Shalala requesting information pertaining to Oregon's compliance with the Assisted Suicide Funding Restriction Act of 1997 (ASFRA) You specifically identify Oregon's placement of physician assisted-suicide in the Oregon Health Plan as a source of concern. I am responding on her behalf.

We believe that Oregon is in compliance with the ASFRA. In response to questions 1 and 2 of your letter, I am enclosing our report that describes the Health Care Financing Administration's assessment and ongoing verification of Oregon's compliance with ASFRA. We have enclosed the documents that respond to question 3 as well. Please note that last year's E-mail was discarded as part of routine maintenance of our E-mail system. Nonetheless, we have provided copies of E-mail in situations where an employee had archived it, and it could be retrieved.

I hope that this information satisfies your request. I am forwarding a copy of this letter to Mr. Dingell and the co-signers of your letter. Please contact Bonnie Washington of my staff at (202) 690-5960 if you have any additional questions.

Sincerely,

Nancy-Ann Min Deparle
Administrator

Enclosure

Final Report

Questions from the House Commerce Committee

Question 1: Please explain whether the Oregon Health Plan (OHP) complies with the Assisted Suicide Funding Restriction Act.

Question 2: Please explain the review process that Health Care Financing Administration used to reach this determination. Please include in this answer, all efforts, pre- and post-approval, that were made to review whether the OHP complied with 42 U.S.C. 1440 l-08. "All efforts" should be defined to include on-site visits by HCFA officials, meetings with Oregon Health Plan Officials, review of congressional intent with respect to the Assisted Suicide Funding Restriction Act, and meetings with any outside experts regarding this issue.

HCFA's response to Questions 1 and 2

We believe that the Oregon Health Plan is in compliance with the Assisted Suicide Funding Restriction Act (ASFRA). The Health Care Financing Administration (HCFA) has clearly and repeatedly informed the Oregon Medicaid program that Federal funds are not available to pay for any services related to physician-assisted suicide. We have worked extensively with the state to create a system that ensures compliance with ASFRA. This system was implemented on December 1, 1998. In our review of Oregon's system and procedures to ensure compliance, we learned that, prior to December 1, 1998, there is a remote possibility a physician may have erroneously submitted claims to Oregon fee-for-service Medicaid for services related to physician-assisted suicide. Oregon Medicaid has agreed to conduct a comprehensive analysis to determine whether or not such payments were mistakenly made. HCFA will carefully audit the results of this analysis. Although we believe it is highly unlikely that any such mistakes occurred, as a contingency measure, HCFA has already initiated discussions with Oregon Medicaid to develop a process for recouping any Federal funds that may have inadvertently been drawn down by the state for the provision of these services.

Background and Supporting Information

In March 1993, Oregon received approval from HCFA, to implement a Section 1115 demonstration known as the Oregon Health Plan (OHP) that involved the restructuring of

the Medicaid benefit package into a Priority List of Health Services. The order of the 743 treatment/condition pairs included in the list was based on medical necessity as well as cost-effectiveness. Oregon's Health Services Commission (HSC) develops the Priority List and evaluates any medical changes to the list, while the Office of Medical Assistance Programs (OMAP) implements the changes. In March 1998, Oregon received a three year extension, as permitted under the Balanced Budget Act of 1997, to the original five year 1115 demonstration.

In 1994, Oregon voters approved a ballot measure, the Oregon Death with Dignity Act. This Act legalized Physician Aid In Dying (PAID) in the State of Oregon. A challenge to the Act was defeated in another ballot measure in 1997. PAID consists of six types of provider encounters:

1) medical confirmation of the terminal condition;
2) two visits when the patient makes the oral request;
3) visit when the written request is made by the patient;
4) visit when the prescription is written;
5) counseling consultation(s); and ,
6) medication and dispensing.

In 1997, Congress passed ASFRA. This Act prohibits the use of Federal funds to cover assisted suicide, euthanasia, or mercy killing; to pay any expenses related to such services; or to pay for health benefit coverage which includes coverage of such services. ASFRA amended sections 1903(I) and 1902(w) of the Social Security Act to specifically extend these prohibitions to the Medicaid program.

Oregon's HSC scheduled a public hearing in February 1998 to determine whether PAID should be included on the Priority List for the Oregon Health Plan. The HSC determined that the Oregon electorate supported allowing all residents, including low-income Oregonians, to have access to PAID services. HSC ranked PAID within line 263, Terminal Illness Regardless of Diagnosis. This is above the funding line and therefore covered under the Oregon Health Plan. In order to implement change, OMAP convened an advisory group of physicians, psychologists, hospice workers and others to develop an administrative process to ensure that no Federal funds would be used for PAID services.

On May 1, 1998, Oregon informed HCFA that Oregon's Health Services Commission had decided to incorporate physician assisted suicide into the Priority List for OHP. Oregon asserted to HCFA that the addition of PAID to the Priority List was a technical change, not a modification to the Medicaid benefit package for which Federal Financial

Participation (FFP) is available, and therefore required only Federal notification and not Federal approval. Oregon's notification detailed the following procedures to ensure compliance with ASFRA:

- All PAID services for OHP eligibles would be paid on a fee-for-service basis and excluded from capitation rates paid to managed care plans in order to meet the ASFRA requirements. Any encounter meeting the criteria identified in Oregon's Death with Dignity law as one of the six PAID-related services described above would be billed separately from any other service. Once an individual has been diagnosed as terminally ill and meeting the eligibility requirements for PAID-related services, ASFRA would apply.

- All PAID-related services provided to OHP eligibles would be paid with state only funds.

- Physicians would be instructed to send PAID claims for OHP eligibles to a unique post office box. All other Medicaid claims are either submitted electronically or are sent to different post office boxes.

- Previously identified OMAP personnel would be responsible for processing these claims and reimbursing them, by hand, out of state general funds. PAID services would not be entered into the Medicaid Management Information System (MMIS.) The post office box, personnel time associated with processing PAID claims, and all other administrative costs would be tracked and paid out of state general funds.

In evaluating Oregon's compliance with ASFRA, HCFA relied on the House Committee Report on ASFRA, which stated that a state could maintain eligibility for Federal funds by contracting "solely with managed care plans that do not cover assisted suicide, euthanasia, or mercy killing, or work out an arrangement by which they are subsidized from a segregated fund containing only State or private funds." [H.R. Rep. No. 4, 105th Congress, 1st Sess. 14 (1997)].

HCFA has also reviewed the use of HCFA 1500 forms by Oregon physicians when submitting claims for PAID-related services. HCFA, in consultation with DHHS' Office of the General Counsel, has concluded that the use of these forms does not constitute a violation of ASFRA. HCFA 1500 forms are used in a variety of health insurance contexts, including the Medicaid program. Physicians and others directly purchase HCFA 1500 forms from various sources, including the Government Printing Office (GPO) and private entities. Oregon is not one of those sources and, therefore, cannot and

does not claim production or distribution costs associated with these forms as administrative costs in the operation of its Medicaid program. Furthermore, whatever costs GPO may have incurred in producing the HCFA 1500 forms are merely incidental to the production of the forms for use throughout the health care industry in public and private settings. In any event, these costs are ultimately recouped when HCFA 1500 forms are purchased.

On September 1, 1998, HCFA responded to OMAP reiterating that Federal funding was not available for any items or services associated with PAID, consistent with ASFRA. This prohibition includes both related physician services and administrative costs. HCFA emphasized its responsibility to review Oregon's procedures for processing PAID claims to ensure compliance with ASFRA.

This letter included HCFA's determination that, based on the above information and our ongoing discussion with OMAP, that Oregon Medicaid was in compliance with ASFRA and would be able to completely segregate all PAID-related service payments from the Priority List of services that receive FFP with the implementation of an entirely separate claims processing system for fee for service PAID claims. None of the managed care plans would receive capitation rates that include payment for PAID-related services. HCFA also concurred that, as a service that does not receive FFP, the addition of state-only coverage of PAID to OHP did not require HCFA approval.

On November 30, 1998, OMAP widely disseminated a revision to the Medical-Surgical Services provider guide. Recipients included all OHP-participating physicians, health care professionals, and billing agencies for these providers in the State of Oregon. The Pharmaceutical Services Guide and American Indian/Alaska Native Billing Guide were updated with this information in correspondence sent on February 1, 1999. This notice directs providers to submit PAID claims to the distinct post office box using appropriate CPT and prescription codes. OMAP began covering PAID under the Oregon Health Plan on December 1, 1998. To date, no PAID claims have been submitted through this process.

At a meeting on January 27, House Commerce Committee staff raised several questions regarding Oregon's coverage of PAID in OHP and HCFA's oversight of the state's processes. In order to provide further assurance to the Committee that Oregon is in compliance with ASFRA, HCFA Regional Office staff performed an on-site review of Oregon's claims processing procedures on February 8. The Regional Office found that Oregon currently has the previously described distinctive processes in place for claims associated with PAID and is in compliance with ASFRA.

To further ensure that no Federal matching funds are inadvertently claimed if a provider incorrectly submits a bill for services, Oregon has agreed to the following additional safeguards as outlined in a letter to the director of OMAP dated February 19:

1) To develop unique billing codes for PAID services, including distinctive diagnosis and drug codes. These codes would assure rejection of the claim from MMIS.

2) To analyze Medicaid payments prior to December 1, 1998 (the date Oregon began providing PAID services in a manner consistent with HCFA's September guidance) to determine if any payments for PAID services were erroneously billed to Medicaid. This analysis will be completed by April 1. If any unallowable payments are identified, Oregon will promptly adjust Medicaid FFP expenditure reports to reflect accurate and allowable expenditures.

3) To conduct annual analyses of Medicaid payments to ensure identification and segregation of PAID services to assure accurate and allowable FFP expenditures.

In summary, HCFA believes that Oregon's Medicaid program is in compliance with the Assisted Suicide Funding Restriction Act of 1997. HCFA will continue to monitor and to ensure compliance with ASFRA through the activities listed above.